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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 110

CLEO E. LOVETT,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY BRIEF FOR PETITIONER

The Solicitor General
for the United States.

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No. 990

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Petitioner,

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY BRIEF FOR PETITIONER TO GOVERNMENT'S BRIEF IN OPPOSITION

QUESTION PRESENTED FOR REVIEW

Whether or not counsel for Petitioner compiled with Rule 30 of the Federal Rules of Criminal Procedure in his request that

a charge on circumstantial evidence be given by the trial judge. (Question (2), page 3 of Brief in Chief).

STATUTORY PROVISIONS AND SUPREME COURT RULE INVOLVED

The statute involved is:

Federal Rules of Criminal Procedure, 30, 18 U. S. C. A. (Appendix "B", page 28 of Brief in Chief)

The Supreme Court Rule involved is:

Supreme Court of the United States, Revised Rules, effective July 1, 1954, Rule 41, Briefs on the Merits-Time for filing, paragraph 5, reading as follows:

"Whenever a party desires to present late authorities, newly enacted legislation, or other intervening matters that were not available in time to have included in his brief in chief, he may file forty printed copies of a supplemental brief, restricted to such new matter and otherwise in conformity with these rules, up to the time the case is called for hearing, or, by leave of court, thereafter."

STATEMENT OF THE CASE

The Petitioner and divers other parties were indicted and convicted of conspiring to violate the Internal Revenue Code. (R-2,775) An appeal of this conviction was taken to the Court of Appeals for the Fifth Circuit. One of the assignments of error upon which that Appeal was grounded was that the trial

court erred in its refusal to give a requested circumstantial evidence charge. The Court of Appeals, in a Per Curiam opinion, affirmed the conviction. The Petitioner's contentions as to the requested circumstantial evidence charge were rejected on two grounds: (1) That Petitioner failed to comply with Rule 30 of the Federal Rules of Criminal Procedure by failing to request the charge and (2) even if the Petitioner had requested the charge the Court would not have been in error in refusing the request. (Appendix "A", page 25, brief in chief).

In Petitioner's brief in chief he has attacked both points of the Court of Appeal's opinion on its affirmance of the trial court's refusal to give the circumstantial evidence charge.

New matter has just come to the attention of counsel for the Petitioner which it is felt will conclusively show that Petitioner had, in legal effect, requested the charge and that the Court of Appeals affirmance on that ground is therefore erroneous. It is the purpose of this supplemental brief to present this newly discovered matter to the Court. Petitioner's arguments as to the other proposition upon which the Court of Appeals relied have been fully covered in the brief in chief.

ARGUMENT

THE COURT OF APPEALS ERRED IN HOLDING THAT PETITIONER DID NOT COMPLY WITH THE FEDERAL RULES OF CRIMINAL PROCEDURE BECAUSE THERE WAS A WRITTEN REQUEST FOR A CIRCUMSTANTIAL EVIDENCE CHARGE WHICH WAS DENIED AND THERE WAS SPECIFIC OBJECTION TO THE DENIAL: BOTH THE DENIAL AND REQUEST BEING MADE UNDER SUCH CIRCUMSTANCES AS TO INURE TO THE BENEFIT OF PETITIONER FOR THE PURPOSE OF APPELLATE REVIEW.

It was the decision of the Court of Appeals that the Petitioner had failed to comply with the Federal Rules of Criminal Procedure by his failure to request the charge on circumstantial evidence and therefore that the Petitioner could not rely upon the refusal to give such a charge as grounds for appeal. More specifically, the Court said:

> "As to the second point, not only did appellants fail to comply with Rule 30 of the Federal Rules of Criminal Procedure, *since they did not request such a charge* . . . ." (Emphasis ours) (Appendix "A", page 24, brief in chief)

It is the contention of the Petitioner that: (1) Such a request was made and that it was made in writing; (2) that upon the trial judge's denial of the requested instruction there was objection to such denial and sufficient grounds stated therefore; (3) that such requests and denials fully compiled with Rule 30 of the Federal Rules of Criminal Procedure; and (4) that such requests and denials were made in behalf of all the co-defendants on trial, including the Petitioner.

Mr. Moore, Attorney for Defendant Wilbur Reeves, presented to the trial judge a written request for an instruction as to circumstantial evidence. Said instruction appears in the record, page 784-785 and reads as follows:

DEFENDANT REEVES' REQUESTED CHARGE

NO. 1.

TITLE OMITTED.)

Where circumstantial evidence is relied upon in a criminal prosecution, proof of a few facts or a multitude of facts all consistent with the supposition of guilt is not sufficient to warrant a verdict of guilty. In order to convict a person upon circumstantial evidence, it is necessary not only that the circumstances all concur to show that the defendant committed the crime and be consistent with the hypothesis of guilt, since that is to be compared with all the facts proved, but that they be inconsistent with any other rational conclusion and exclude every other reasonable theory or hypothesis except guilt. The facts proved must be consistent with each other and with the main fact sought to be proved. A reasonable doubt must be resolved in favor of the defendant where a fact or circumstances is susceptible of two or more interpretations. If the circumstances tending to show the guilt of the defendant are as consistent with his innocence as with his guilt, they are insufficient. In order to convict a person of a crime, the facts must be inconsistent with, or such as to exclude, every reasonable hypothesis or theory of defendant's innocence. Great care, however, must be exercised in drawing inferences from circumstances proved in crimi-

nal cases, and mere suspicions will not warrant a conviction.

20 Am. Jur. 1068-1070.

R. WORTH MOORE,
(R. Worth Moore),
Attorney for Wilbur Reeves.

Lewis State Bank Building,
Tallahassee, Florida

Granted: .....

Denied:

FRANK M. JOHNSON, JR.
Judge.

At the close of all the evidence, Mr. Douglas, Attorney for Defendant Wood, addressed the Court:

"Mr. Douglas:

Your Honor, may I ask this question; have I a right to assume that in your general charge on circumstantial evidence that you would charge a jury that circumstantial evidence is received with caution by a jury?" (R-733)

In reply to this, the Court said, in part:

"The Court:

As I understand the law, the proposition that when circumstantial evidence forms a part or all of the case then that evidence must exclude beyond any and every

reasonable hypothesis is no longer the law, and that has been changed in the Fifth Circuit." (R-734)

Later in the exchange, Mr. Douglas said:

"Mr. Douglas:

Well, it is your view that my request--

"The Court:

It is my view that I should not, and it is not my intention to, charge the jury that when a case is based upon circumstantial evidence, such as this case partly is, that they should receive that cautious with--receive that--consider that evidence with great care and caution. Would be error, and I am not going to charge that." (R-735)

After this request for a charge on circumstantial evidence, the denial thereof and the objection to that denial, Mr. Douglas requested various other charges. Then Mr. Moore, Attorney for Defendant Reeves, addressed the Court:

"Mr. Moore:

Mr. Douglas has just answered, I mean asked upon both of these questions, Your Honor. I previously submitted to you written requested instructions."

"The Court:

Yes, I am going to refuse--I am going to refuse all of your written requested instructions. That doesn't mean, of course, that I just-- my answer to your last

question shows that it doesn't mean I won't charge part of that, or considerable part of it." (R-736)

Subsequently, the Court delivered an oral charge to the jury. Before the jury retired to reach their verdict, the following exchange took place:

"The Court:

All right, now, if you will, for the defendant Wood, Mr. Douglas, state your exceptions and objections.

"Mr. Douglas:

No exceptions to the charge as given; however, I would like to preserve my exception to the requested charge.

"The Court:

All right, in that connection, each charge that you requested, and this is as to each defendant requesting, have been refused, either on ground that they are inaccurate statements of the law, or if accurate, covered adequately and fully in the oral charge." (R-769)

Further along in the exchange the Court called on Mr. Lee, Attorney for Petitioner at trial:

"The Court:

Lovett, Ward, and Williams.

"Mr. Lee:

Same situation, Your Honor, no exceptions, and we would adopt the same request that--as was--as was pre-

viously done on the matter mentioned by Mr. Douglas.

"The Court:

I don't know whether I understand what you are talking about or not; *are you objecting to my not giving the requested--written requested charge;* is that what you are-- (emphasis ours)

"Mr. Lee:

That's right, just preserving that, Your Honor, excuse me." (R-770)

Thus, the record shows that counsel for the Petitioner, at trial, objected to the denial of the written requested charge on circumstantial evidence and adopted the grounds stated by Mr. Douglas for the basis of that objection.

It is urged that the written request served fully to inform the Court of the nature of the charge being requested and that the objections and arguments concerning the denial of the request served fully to inform the judge of the import of his overruling the objections.

In a case such as the one at bar, wherein there are several co-defendants, each represented by different counsel, who are indicted and tried simultaneously; it would appear to be both illogical and highly inefficient to require that each counsel parrot the other when a request or an objection has been made to the Court. The folly of requiring such repetition has long been recognized by the Courts. In *Gardner v. United States, Coudrey v. United States,* 230 F. 575 (8 Cir. 1916), the co-defendants were tried and convicted of mail fraud. One of the assignments or error was that the Court erred in refusing

to give a requested instruction. Counsel for only one of the co-defendants had requested the instruction and stated his objection to the denial. The Government contended that only the defendant who had made the request and the objection was entitled to raise it as error on appeal. In reversing the conviction, the Court rejected the Government's contention. The Court said:

> "It is claimed that assignment of error number three, made by the defendant Coudrey, was based upon a request and exception made by Coudrey alone and that the same cannot be invoked in behalf of the defendant Gardner. Under the facts appearing in this record we do not think this so. Gardner and Coudrey were jointly indicted and so tried. They were represented it seems by different counsel. Sometimes counsel for Coudrey would make an objection and take an exception, sometimes counsel for Gardner would do the same. When we come to consider that the object of making objections and taking an exception is to call the attention of the trial court specifically to some point of law that there may be a ruling upon the same in order to have it reviewed in the appellate court, it at once appears that to accomplish the object of the objection and exception it was only necessary that one counsel call the court's attention to it. So far as the real object of making an objection and taking an exception is concerned it would have been idle formality for counsel for each defendant to make the same objection and exception to the same ruling." *Gardner*, supra, 230 F. at 580.

Only one other Federal decision has discussed this point. In *Slade v. United States*, 267 F 2d. 834 (5 Cir. 1959), the *Gardner* case was cited with approval. Petitioner urges that the paucity

of case decision on this point is indicative of the well settled nature of this question.

Petitioner therefore respectfully submits that the Court of Appeals' denial of the written request filed by Mr. Moore and the objections and arguments thereto made by Counsellors Douglas, Moore and Lee, all inure to the benefit of the Petitioner and can be relied upon by him for the purposes of complying with Rule 30 and as grounds upon which to base his appeal and this petition.

CONCLUSION

WHEREFORE, it is respectfully submitted that the Petitioner has fully complied with the Federal Rules of Criminal Procedure and that therefore, the Petition for Writ of Certiorari should be granted.

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Petitioner.

PROOF OF SERVICE

I hereby certify that I have made service of 3 copies of the foregoing supplemental brief for Petition for Certiorari upon Hon. Archibald Cox, the Solicitor General, Department of Justice, Washington 25, D. C. by depositing same in an envelope so addressed and placing the same in the United States Post Office at Jacksonville, Florida, on the 6th day of July, 1961, with sufficient postage to insure delivery.

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